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12 UNITED STATES DISTRICT COURT  
13 SOUTHERN DISTRICT OF CALIFORNIA  
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15 \_\_\_\_\_  
16 GENARO VEGA-MORFIN,

17 Petitioner,

18 v.

19 UNITED STATES OF AMERICA

20 Respondent.  
21 \_\_\_\_\_

)  
)  
) Cr. No. 10-3970GT

) Cv. No. 11-1357GT

) **ORDER**  
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)

22 On June 16, 2011, Petitioner, Genaro Vega-Morfin ("Mr. Vega"), filed a Motion for  
23 Reduction of Sentence, presumably pursuant to 28 U.S.C. § 2255. Mr. Vega requests a downward  
24 departure based on his status as a deportable alien, which Mr. Vega asserts "should have been  
25 considered as a mitigating factor" at his sentencing. The Court has fully considered this matter,  
26 including a review of Mr. Vega's brief filed, the authorities cited therein and the arguments  
27 presented. For the reasons stated below, Mr. Vega's Motion to Modify Sentence is **DENIED**.

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1 First, Mr. Vega pled guilty, pursuant to a written plea agreement, to one count of Attempted  
2 Entry After Deportation, in violation of 8 U.S.C. § 1326(a) and (b). In the written plea agreement,  
3 Mr. Vega explicitly waived his right to appeal and/or collaterally attack his conviction or sentence.  
4 The Ninth Circuit has long acknowledged that the terms of a plea agreement are enforceable. *See*,  
5 United States v. Baramdyka, 95 F.3d 840, 843 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1282 (1997).  
6 Since Mr. Vega expressly waived his statutory right to appeal or collaterally attack his sentence in  
7 his plea agreement, Mr. Vega is now precluded from challenging that sentence pursuant to 28  
8 U.S.C. § 2255. *See*, United States v. Abarca, 985 F.2d 1012, 1014 (9th Cir. 1993) (holding that  
9 a knowing and voluntary waiver of a statutory right is enforceable).

10 Moreover, even if Mr. Vega had not expressly waived his right to appeal or collaterally  
11 attack his sentence, his petition would still fail. In essence, Mr. Vega argues that because of his  
12 status as a deportable alien, he is "ineligible[] for pre-release custody and minimum security  
13 confinement." Mr. Vega argues that the Court should grant him a downward departure because  
14 of his status. However, Mr. Vega's argument that the Court should depart downward because  
15 he is a deportable alien is precluded by statute and current Ninth Circuit case law. By statute,  
16 the Court may depart downward only if there are "aggravating or mitigating circumstances . . .  
17 not adequately taken into consideration by the Sentencing Commission." 18 U.S.C. § 3553(b).  
18 Specifically, the Ninth Circuit has held that the threat of deportation is not a factor that the  
19 district court may consider for sentencing purposes. United States v. Alvarez-Cardenas, 902  
20 F.2d 734, 737 (9th Cir. 1990).<sup>1</sup> Accordingly,

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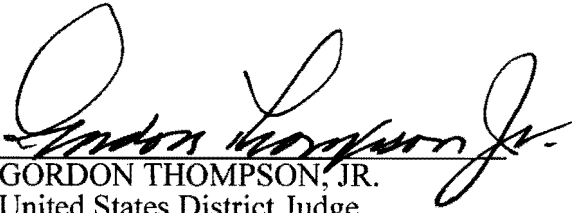
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26 <sup>1</sup> The Ninth Circuit decided, in an unpublished opinion, that the defendant, like Limon, was not  
27 entitled to a six month reduction in his sentence under 18 U.S.C. § 3553(b) because as a  
28 deportable alien he is not eligible to spend the last six months of his sentence in a half way  
house pursuant to 18 U.S.C. § 3624(c). *See* United States v. Zepeda-Valles, 87 F.3d 1325 (9th  
Cir. 1996).

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**IT IS ORDERED** that Mr. Vega's Motion to Modify Sentence is **DENIED**.  
**IT IS SO ORDERED.**

10/26/12  
date

  
GORDON THOMPSON, JR.  
United States District Judge

cc: AUSA Bruce Castetter

Petitioner